UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JEAN M. COOK,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Civil No. 94-134-P-H***
	)	
DONNA E. SHALALA,	)	
Secretary of Health	)	
and Human Services,	)	
	)	
Defendant	)	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Supplemental Security Income ("SSI") appeal raises the single issue whether, in light of a finding that the plaintiff was not engaged in substantial gainful activity by earning $40 a week as a babysitter, the Secretary erred by determining that this is past relevant work the plaintiff is capable of performing, and that the plaintiff is therefore not entitled to benefits based on disability.

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. § 416.920; *Goodermote v. Secretary of Health & Human Servs*, 690 F.2d 5 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff has not engaged in substantial gainful activity

[1] This action is properly brought under 42 U.S.C. § 1383(c)(3). The Secretary has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 26, which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the Secretary's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on February 28, 1995 pursuant to Local Rule 26(b) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, cause authority and page references to the administrative record.

since September 15, 1991, Finding 1, Record p. 18; that she suffers from "severe vertebrogenic disorder and asthma," but that she does not have an impairment or combination of impairments that is equal to any listed in Appendix 1 to Subpart B, 20 C.F.R. § 404 (the "Listings"), Finding 2, Record p. 18; that she has the residual functional capacity to perform her past relevant work, which he defined as babysitting or child care in light of the $40 per week she has been earning as a babysitter, Findings 4-6, Record p. 18; and that, therefore, she was not under a disability and thus not entitled to SSI benefits, Finding 7, Record p. 19. The Appeals Council declined to review the decision, Record pp. 3-4, making it the final determination of the Secretary, 20 C.F.R. § 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F. 2d 622, 623 (1st Cir. 1989).

The standard of review of the Secretary's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 405(g); *Lizotte v. Secretary of Health & Human Servs.*, 654 F. 2d 127, 128 (1st Cir. 1981). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The plaintiff first contends that there is not substantial evidence in the record to support the administrative law judge's finding as to her residual functional capacity for work. Specifically, the administrative law judge found that the plaintiff could perform the full range of light work "reduced by her inability to stand for more than 15 to 20 minutes in one position and to walk more than two miles." Finding 4, Record p. 18; *see* 20 C.F.R. § 416.967(b) (describing exertional requirements of light work). To challenge this finding, the plaintiff points to her testimony that she can only walk a half mile and that she has trouble with both standing and sitting for more than 15 or 20 minutes.

See Record at pp. 30-31. She also contends the administrative law judge improperly ignored her testimony about recent muscle spasms, *see id*. at 53, and what she characterizes as a physician's note limiting her to ten hours of work per week with no lifting or stooping, *see id*. at 175.

The latter piece of evidence is a form requesting medical information completed by the plaintiff in connection with an application for general assistance benefits. The form was then apparently sent to a health care provider, unidentified except for an illegible signature, who provided the information cited in the previous paragraph. The administrative law judge explicitly discounted this evidence, noting that there is no clinical basis stated for the restrictions and no evidence as to the qualifications of the person signing the form. Record p. 16. While the administrative law judge may not disregard "uncontroverted medical opinion," *Rosado v. Secretary of Health & Human Servs*., 807 F.2d 292, 293-94 (1st Cir. 1986), it is within his province to make determinations of credibility and to resolve conflicts in the evidence, *Irlanda Ortiz v. Secretary of Health & Human Servs*., 955 F.2d 765, 769 (1st Cir. 1991). The administrative law judge relied on a report from the plaintiff's examining physician that as of August 1993 she displayed "no evidence of neurologic or mechanical deficit," that "[t]here do not appear to be any mechanical or neurologic restrictions to her capabilities," and that the plaintiff reported experiencing back pain when walking two miles every day from her home into town. *See* Record at pp. 15-16, 172. He also noted the plaintiff's own testimony that she is able to walk for an hour. *See id*. at 17, 30. Accordingly, the judge found that the plaintiff is "not as limited as she contends" and that her contentions regarding pain are not entirely credible. *Id*. at 17. He nevertheless accepted the plaintiff's contentions regarding the limits of her ability to stand and lift. Since there is substantial evidence in the record to support these

findings, they were properly stated to the vocational expert as the plaintiff's residual functional capacity for work.

The plaintiff next contends that the administrative law judge committed an error of law in using this assessment of her residual functional capacity to determine at Step Four that she could return to her past relevant work, which the vocational expert variously defined as babysitting or child care. *See id*. at 17-18, 56-57. The plaintiff stated that she worked as a nurse's aid until September 1991 when a workplace back injury forced her to leave that profession and work part-time as a babysitter. *Id*. at 25, 34. It is undisputed that the plaintiff's current earnings of $40 per week are insufficient to qualify her babysitting work as substantial gainful activity for purposes of Step One of the Secretary's evaluative process. *See* 20 C.F.R. § 416.974(b)(3)(vii) (in calendar years after 1989, earnings less than $300 per month not substantial gainful activity). The plaintiff contends that the Secretary erred in defining as "past relevant work" at Step Four work that was not substantial gainful activity at Step One. I agree.

The question has not been resolved in this circuit, but other courts that have examined the issue have concluded that the Social Security Act and the regulations do not permit a claimant who is not engaging in substantial gainful activity to be denied either disability or SSI benefits because she is capable of returning to what, by definition, is *insubstantial* gainful activity. *See Taylor v. Sullivan*, 951 F.2d 878, 882-83 (8th Cir. 1991); *Connolly v. Bowen*, 879 F.2d 862 (4th Cir. 1989) (table), 1989 WL 79726 at **3; *Lauer v. Bowen*, 818 F.2d 636, 641 (7th Cir. 1987); *Vaughn v. Heckler*, 727 F.2d 1040, 1042 (11th Cir. 1984); *Thorgerson v. Secretary of Health & Human Servs.*, 1994 U.S. Dist. LEXIS 18123 at *19 n.9 (D.N.H. Dec. 12, 1994); *see also Curtis v. Sullivan*, 808 F. Supp. 917, 922 (D.N.H. 1992). Indeed, such a conclusion is a logical inference from the guidance

provided by the Secretary concerning the procedures used to determine a disability claimant's ability to perform past relevant work. *See* Social Security Ruling 82-62, reprinted in *West's Social Security Reporting Service* at 809 (1982). In discussing "The Relevance of Past Work" in Ruling 82-62, the Secretary begins by quoting the general regulations stating that "work experience applies [i.e., is relevant] when it was done within the last 15 years, lasted long enough for you to learn to do it, and was substantial gainful activity [SGA]." *Id*. (brackets in original), quoting 20 C.F.R. §§ 404.1565(a) and 416.965(a). The Ruling further provides:

> Capacity to do past work may be indicative of the capacity to engage in SGA when that work experience constituted SGA and has current relevance considering duration and recency.
>
> 1. SGA
>
> The adjudicative criteria for determining whether a person has done "substantial" and "gainful" work activity are explained in sections 404.1571-404.1575 and 416.971-416.975 of the regulations.

Id. at 810. As noted, *supra*, these regulations required the Secretary to determine that a $40 per week babysitting job is not substantial gainful activity. In *Connolly* and *Lauer*, the courts found in this language from Ruling 82-62 concerning substantial gainful activity the authority for concluding that the Secretary does not credit as past relevant work that which is not substantial gainful activity. *See Connolly*, 1989 WL 79726 at **2 to **3; *Lauer*, 818 F.2d at 639-640. In *Taylor*, the Eighth Circuit relied soley on the language in section 416.965 quoted *supra*. *See Taylor*, 951 F.2d at 882-83. I find these authorities persuasive.

Lauer prompted a dissenting opinion advancing a view that the Social Security Act, the regulations and Ruling 82-62 all permit the denial of benefits at Step Four if there is a finding that the claimant is capable of performing past work at a level that would make it substantial gainful

activity, even if the claimant had not previously worked at that level. *See Lauer*, 818 F.2d at 642 (Posner, J., dissenting). In so concluding, the *Lauer* dissent relies on the language in section 404.1571 advising claimants that, "[e]ven if the work you have done was not substantial gainful activity, it may show that you are able to do more work than you actually did." *Id*. at 643. Section 416.971, applicable to this case, contains an identical provision; here, as in *Lauer*, the administrative law judge explicitly found that the claimant is capable of performing the part-time work in question on a fulltime basis. *See* Finding 6, Record p. 18.

The view articulated by Judge Posner has some logical appeal. But, in my opinion, to adopt such a conclusion could short-circuit the five-step evaluative process established by the Secretary, most notably as it relates to burden of proof. At Step Four, the claimant has the burden of proving that her impairment prevents the performance of her past relevant work; at Step Five, the burden shifts to the Secretary to demonstrate that there are jobs in the national economy the claimant is capable of performing in light of her residual functional capacity for work. *Bowen v. Yuckert*, 482 U.S. 137, 146-47 n.5 (1987); *Dudley v. Secretary of Health & Human Servs.*, 816 F.2d 792, 794-95 (1st Cir. 1987) (discussing claimant's burden at Step Four); 20 C.F.R. § 416.920(e) and (f). Thus, to permit the Secretary to find an ability to perform past relevant work at Step Four by extrapolating from gainful activity that was not substantial at Step One would effectively be to shift to the claimant the burden of demonstrating that there are not jobs in the national economy that she can perform. For example, in *Connolly*, the claimant's only former employment experience had been working as a babysitter, earning approximately $25 per week. *Connolly*, 1989 WL 79726 at **1. The Secretary found she had the residual functional capacity to perform work as a babysitter and denied her SSI benefits because he defined the babysitting as past relevant work, even though the claimant was 63

years old, had poor command of written English, suffered from a variety of serious health problems and accordingly would have been entitled at Step Five to an automatic finding of "disabled" pursuant to Appendix 2 to Subpart B, 20 C.F.R. § 404 (the "Grid"). *Id*. at **1 to **3. Thus, what the claimant had improperly been required to disprove at Step Four became that which the Secretary was unable to prove at Step Five. I do not believe this is what the regulations are intended to accomplish by noting that past work, although not substantial gainful activity, may be relevant to show that the claimant is capable of doing more work than she actually performed. Rather, I believe this language puts the claimant on notice that the Secretary may use such evidence to help meet her burden at Step Five. Therefore, I conclude that the Secretary erred here in determining at Step Four that the plaintiff was capable of returning to her past relevant work, and that a remand is therefore necessary. *Cf. Thorgerson*, 1994 U.S. Dist. LEXIS 18123 at *19, *28 (administrative law judge's *Lauer*-type error at Step Four harmless where judge also performed Step Five analysis and substantial evidence supported determination).

Moreover, even if I were to adopt the view of the *Lauer* dissent, a remand would still be required. The Secretary's determinations must be supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Lizotte v. Secretary of Health & Human Servs.*, 654 F. 2d 127, 128 (1st Cir. 1981). Here, the vocational expert testified only that the plaintiff "could return to the babysitting." Record p. 56. Although she testified that child care work is a recognized occupation, *id*., she never testified that the plaintiff could return to the babysitting on a fulltime basis. Therefore, the administrative law judge's finding to that effect is not supported by substantial evidence.

Accordingly, I recommend that the Secretary's decision be **VACATED** and the cause **REMANDED** for proceedings consistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 9th day of March, 1995.

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David M. Cohen
United States Magistrate Judge